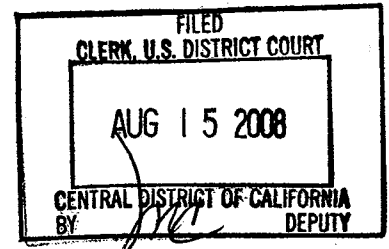


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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

BRIAN KEITH DENT,  
Petitioner,  
v.  
MIKE KNOWLES, WARDEN,  
Respondent.

Case No. CV 08-05255 JFW (AN)

**ORDER TO SHOW CAUSE RE  
DISMISSAL OF PETITION FOR  
WRIT OF HABEAS CORPUS BY A  
PERSON IN STATE CUSTODY AS  
TIME-BARRED**

**I. BACKGROUND**

Before the Court is a petition for a writ of habeas corpus ("Petition") brought by Brian Keith Dent ("Petitioner"), a state prisoner proceeding *pro se*. The Petition is brought pursuant to 28 U.S.C. § 2254 and it raises five claims directed at Petitioner's 1998 conviction and related prison sentence of sixty years to life that he sustained following a guilty plea in the Los Angeles County Superior Court (No. TA048724). (Pet. 2, Ex. D.) For the reasons set forth below, Petitioner is ordered to show cause why his Petition should not be dismissed with prejudice because it is time-barred.

## II. DISCUSSION

### A. Standard of Review

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, states that “the judge to whom [the petition] is assigned” is required to examine the petition promptly and “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified.” Local Rule 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed *sua sponte*, however, the district court must give the petitioner adequate notice and an opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

### B. Statute of Limitations

The Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state prisoners to file a habeas petition in federal court, because the Petition was filed after April 24, 1996, AEDPA’s enactment date. 28 U.S.C. § 2244(d)(1); *See Lindh v. Murphy*, 521 U.S. 320, 327-37, 117 S. Ct. 2059 (1997). In most cases, the limitation period begins to run from “the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

The face of the Petition, accompanying exhibits, and relevant state court

1 records<sup>1/</sup> show Petitioner sustained his underlying conviction on April 29, 1998, and  
 2 was sentenced on May 13, 1998. (Pet. 2.) The Petition and relevant state court  
 3 records also establish that the California Supreme Court denied his petition for review  
 4 on May 12, 1999, and that Petitioner never filed a petition for certiorari with the  
 5 United States Supreme Court. (Pet. 3; No. S077665; Official records of California  
 6 courts.) Therefore, for purposes of AEDPA's limitation period, his judgment became  
 7 final on August 10, 1999, which is the ninetieth day after his petition for review was  
 8 denied by the California Supreme Court and the time for Petitioner to file a petition  
 9 for certiorari with the Supreme Court expired. *Bowen v. Roe*, 188 F.3d 1157, 1159  
 10 (9th Cir. 1999). The limitation period then started to run the next day, August 11,  
 11 1999, and ended a year later on August 10, 2000. 28 U.S.C. § 2244(d)(1)(A); *see also*  
 12 *Patterson v. Stewart*, 251 F.3d 1243, 1245-47 (9th Cir. 2001) (the limitations period  
 13 begins to run on the day after the triggering event pursuant to Fed. R. Civ. P. 6(a)).

14 Petitioner missed the deadline because he did not constructively file the pending  
 15 Petition until July 26, 2008<sup>2/</sup> -- 2,907 days (nearly eight years) after the statute expired.  
 16 Therefore, the pending Petition is time-barred unless Petitioner is entitled to statutory  
 17 or equitable tolling, or an alternate start date to AEDPA's statute of limitations period  
 18

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19 <sup>1/</sup> The Court takes judicial notice of Petitioner's records in the state appellate  
 20 courts, which are available on the Internet at <http://appellatecases.courtinfo.ca.gov>.  
 21 *See Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal courts may take  
 22 judicial notice of relevant state court records in federal habeas proceedings).

23 <sup>2/</sup> Pursuant to the "mailbox rule," a *pro se* prisoner's habeas petition is  
 24 deemed to be filed on the date the prisoner delivers the petition to prison authorities  
 25 for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379  
 26 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). The mailbox rule also  
 27 applies to *pro se* state habeas petitions. *Stillman v. Lamarque*, 319 F.3d 1199, 1201  
 28 (9th Cir. 2003). The pending Petition was filed by the Clerk on August 11, 2008,  
 however, for purpose of the timeliness analysis, the Court gives Petitioner the benefit  
 of the doubt by assuming he constructively filed the Petition on July 26, 2008, the date  
 he signed it. (Pet. 8.)

1 under 28 U.S.C. § 2244(d)(1).

2 **C. Statutory Tolling**

3 AEDPA provides a statutory tolling provision that suspends the limitation  
4 period for the time during which a “properly-filed” application for post-conviction or  
5 other collateral review is “pending” in state court. 28 U.S.C. § 2244(d)(2); *Bonner v.*  
6 *Carey*, 425 F.3d 1145, 1148 (9th Cir. 2005). An application is “pending” until it has  
7 achieved final resolution through the state’s post-conviction procedures. *Carey v.*  
8 *Saffold*, 536 U.S. 214, 220, 122 S. Ct. 2134 (2002). The limitation period is not tolled  
9 between the time a final decision is issued on direct state appeal and the time a state  
10 collateral challenge is filed because there is no case “pending” during that interval.  
11 *Thorson v. Palmer*, 479 F.3d 643, 646 (9th Cir. 2007); *Nino v. Galaza*, 183 F.3d 1003,  
12 1006 (9th Cir. 1999).

13 Further, to qualify for statutory tolling during the time the petitioner is pursuing  
14 collateral review in the state courts, his *first* state habeas petition must be  
15 constructively filed *before*, not after, the expiration of AEDPA’s one-year limitation  
16 period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2254  
17 does not permit the reinitiation of the limitation period that has ended before the state  
18 petition was filed”); *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (stating that  
19 filing of state petition after AEDPA’s one-year time period has elapsed bars federal  
20 habeas review); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (“A  
21 state-court petition [] that is filed following the expiration of the limitations period  
22 cannot toll that period because there is no period remaining to be tolled”); *Green v.*  
23 *White*, 223 F.3d 1001, 1003 (9th Cir. 2001).

24 Petitioner did not file his first state habeas petition with the Los Angeles County  
25 Superior Court (No. TA048724) until January 6, 2003, 879 days after the expiration  
26 of the limitation period. Consequently, Petitioner is not entitled to statutory tolling for  
27 any of his state habeas petitions because they were all filed long after the limitation  
28

1 period expired.<sup>3/</sup> *See Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003) (a state  
 2 application for post-conviction relief does not revive the one-year limitation period if  
 3 it has already expired); *see also Jimenez*, 276 F.3d at 482; *Webster*, 199 F.3d at 1259;  
 4 *Green*, 223 F.3d at 1003. Therefore, the face of the Petition, exhibits, and state court  
 5 records establish that this Petition, constructively filed on July 26, 2008, is untimely  
 6 by 2,907 days (the amount of untolled time between the limitation deadline (08/10/00)  
 7 and the Petition's constructive filing date (07/26/08)).

#### 8 **D. Alternative Start of the Statute of Limitations**

##### 9 **1. State-Created Impediment**

10 In rare instances, AEDPA provides that its one-year limitation period shall run  
 11 from "the date on which the impediment to filing an application created by State action  
 12 in violation of the Constitution or laws of the United States is removed, if the  
 13 applicant was prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B).  
 14 Asserting that the statute of limitations was delayed by a state-created impediment  
 15 requires a showing of a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th  
 16 Cir. 2002). The face of the Petition and attached exhibits do not set forth any facts  
 17 showing that Petitioner is entitled to relief under this provision.

##### 18 **2. Newly Recognized Constitutional Right**

19 AEDPA provides that, if a claim is based upon a constitutional right that is  
 20 newly recognized and applied retroactively to habeas cases by the United States  
 21 Supreme Court, the one-year limitation period begins to run on the date which the new  
 22 right was initially recognized by the United States Supreme Court. 28 U.S.C. §  
 23 2244(d)(1)(C). The face of the Petition and attached exhibits do not set forth any facts  
 24 that show Petitioner is entitled to relief under this provision.

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25  
 26  
 27 <sup>3/</sup> *See also Dent v. The People, et al.*, B168285, Cal. App. Ct., 2nd Dist./Div.  
 28 1 (filed Jan. 6, 2003, denied Feb. 11, 2003); *Dent (Brian Keith) on H.C.*, No. S126208,  
 Cal. Supreme Ct. (filed July 12, 2004, denied Aug. 24, 2005).

### 3. Discovery of Factual Predicate

AEDPA also provides that, in certain cases, its one-year limitation period shall run from “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). The face of the Petition and exhibits do not set forth any facts showing that Petitioner is entitled to relief based upon a late discovery of the factual predicate.

#### E. Equitable Tolling

“[E]quitable tolling is justified in few cases,” and “the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005).

By way of his Declaration, Petitioner alleges he should be entitled to equitable tolling from “11/2/99 to the present date 2/1/08” because of his mental illness. (Dent Decl., ¶¶ 3-8.) In support of his contention, Petitioner has attached numerous medical records (likely every medical exam he has had before and after he was incarcerated from 1997 to February 1, 2008) indicating he suffers from dementia, hallucination, and bipolar disorder. (Dent Decl., ¶3; Pet. Ex. A.<sup>4/</sup>) However, none of the mental disorders he claims to have suffered from establish that they prevented him from filing a timely Petition. A closer review of the record belies Petitioner’s contention.

The relevant records appear to indicate his symptoms of delusion, hallucination, and dementia may be caused by his long term use of illegal hallucinogenic drugs,

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<sup>4/</sup> Petitioner failed to designate and consecutively number each page of the attached documents in the manner required by Local Rules 11-3.3 and 11.5.2. Consequently, for ease of reference, the Court has designated Petitioner’s medical records as “Exhibit A” and consecutively designated any other documents thereafter with consecutive page numbers.



1 including daily use of cocaine. Notably, in a March 30, 1998, court-ordered  
2 psychiatric evaluation to determine whether Petitioner was competent to stand trial,  
3 Dr. Crandall opined that “it is difficult to differentiate whether [Petitioner’s] past  
4 psychotic symptoms were due to drug use or to primary mental illness.” (Pet. Ex. B  
5 at 4.) Dr. Crandall’s evaluation also found that “in accordance with Dr. Vicary’s  
6 observations . . . there were various indications that [Petitioner] was malingering or  
7 faking symptoms of mental illness.” (*Id.*) Further, on November 5, 1999, the initial  
8 date in which Petitioner contends his mental disorder began relative to his inability to  
9 file the pending Petition, the relevant medical records show his first request for a  
10 psychiatric evaluation was denied by the prison’s Chief Psychiatrist, Dr. K. Weaver.  
11 (Pet. Ex. A at 21.) Approximately eight months later on July 17, 2000, his second  
12 request for psychiatric evaluation was again denied by Dr. Weaver because “[t]here  
13 does not appear any indication from the referral that he would benefit from inpatient  
14 psychiatric care as his primary problem seems to be post traumatic dementia [and  
15 should benefit more from] a Developmental Disability evaluation . . . for inmates with  
16 *chronic physical disabilities*.” (*Id.* at 22) (emphasis added). Furthermore, pertinent  
17 medical records appear to indicate Petitioner’s alleged mental illness has gradually  
18 improved since his incarceration through daily medication, personal counseling, and  
19 support programs. (Pet. Exs. A, E, F-I.)

20 Even assuming the truth of his assertions, mental and physical disabilities alone  
21 do not warrant equitable tolling where other evidence shows the petitioner could still  
22 have filed a timely petition. *See Gaston v. Palmer*, 417 F.3d 1030, 1034-35 (9th Cir.  
23 2005) (petitioner was not entitled to equitable tolling based upon physical and mental  
24 disabilities since he prepared and filed a state habeas petition while suffering from the  
25 alleged disabilities). Since his conviction in 1998, Petitioner’s own exhibits and  
26 actions establish he filed two state petitions for review along with three state habeas  
27 petitions during the course of his purported mental disorders. (Pet. 2-6; Official  
28 records of California courts.) During this period, he also wrote letters to his attorney,

1 sought legal assistance from fellow inmate Johnson, tracked down his legal and  
2 medical files, and sleuthed out any alleged missing documents. (Dent Decl., ¶3-8; Pet.  
3 Exs. B, C.) Petitioner has quite simply failed to show the slightest causal link between  
4 the alleged mental disabilities and his failure to file a federal habeas petition at any  
5 time during the nearly eleven years since his conviction. *See Allen v. Lewis*, 255 F.3d  
6 798, 800-01 (9th Cir. 2001) (“at the very least, the prisoner must show that the  
7 ‘extraordinary circumstances’ were the but-for and proximate cause of his  
8 untimeliness”).

9       Moreover, Petitioner’s contention that between November 5, 1999, and July 17,  
10 2000, he is entitled to equitable tolling because of his chronic mental illness lacks  
11 merit. (Dent Decl., ¶ 3.) Aside from his conclusory and vague contention, he is not  
12 entitled to any tolling during this period because, as discussed above, there was no  
13 case “pending” during this interval. *Thorson*, 479 F.3d at 646; *Nino*, 183 F.3d at 1006.  
14 Likewise, Petitioner’s contention that he required the assistance of his fellow inmate  
15 to help him file his February 23, 2003, state habeas petition is also unpersuasive to  
16 warrant equitable tolling because his statute of limitation period had already long  
17 expired by that time. In any event, regardless of *how* Petitioner managed to file a slew  
18 of state habeas petitions, write letters, and investigate his case, the fact is he  
19 accomplished these things. He has failed to explain why his fellow inmate who  
20 ostensibly provided valuable aid to him could not have done so while the statute of  
21 limitations was running instead of nearly three years after it expired. *Tacho v.*  
22 *Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988) (mental condition of *pro se* prisoner  
23 and reliance upon allegedly incompetent jailhouse lawyers did not constitute “cause”).

24       Petitioner has not established that anything other than his own lack of diligence  
25 accounts for his failure to file a timely Petition. Further, his history of perpetual,  
26 multiple filings in this and other courts suggests he was not inhibited in any way from  
27 making a timely filing. Accordingly, Petitioner has failed to show that his alleged  
28 mental disabilities amounted to extraordinary circumstances beyond his control,



1 making it *impossible* to file a petition on time. *Brambles v. Duncan*, 412 F.3d 1066,  
2 1069 (9th Cir. 2005).

## 3       **2. Lack of Legal Training, Representation, and/or Education Claims**

4       To the extent Petitioner also appears to be contending that equitable tolling is  
5 warranted because of his lack of legal training, lack of legal representation, and/or  
6 general lack of education, the Court rejects such contention. (Pet. Mem. 8; Dent Decl.,  
7 ¶¶ 3-8; Pet. Ex. D.) Neither the lack of assistance nor ignorance of the law qualify as  
8 extraordinary circumstances warranting equitable tolling. *See Rasberry v. Garcia*, 448  
9 F.3d 1150, 1154 (9th Cir. 2006) (“a pro se petitioner’s lack of legal sophistication is  
10 not, by itself, an extraordinary circumstance warranting equitable tolling” of AEDPA’s  
11 limitation period); *Ekenberg v. Lewis*, No. C 98-1450 FMS (PR), 1999 WL 13720, \*2  
12 (N.D. Cal. Jan. 12, 1999) (“Ignorance of the law and lack of legal assistance do not  
13 constitute such extraordinary circumstances.”); *Bolds v. Newland*, No. C 97-2103  
14 VRW (PR), 1997 WL 732529, \*2 (N.D. Cal. Nov. 12, 1997) (same); *see also Hinton*  
15 *v. Pac. Enter.*, 5 F.3d 391, 396-97 (9th Cir. 1993) (mere ignorance of the law generally  
16 is an insufficient basis to equitably toll the running of an applicable statute of  
17 limitations); *Barrow v. New Orleans S.S. Ass’n*, 932 F.2d 473, 478 (5th Cir. 1991)  
18 (neither “lack of knowledge of applicable filing deadlines,” nor “unfamiliarity with the  
19 legal process,” nor “lack of representation during the applicable filing period,” nor  
20 “illiteracy,” provides a basis for equitable tolling); *cf. Hughes v. Idaho State Bd. of*  
21 *Corr.*, 800 F.2d 905, 909 (9th Cir. 1986) (holding pre-AEDPA that illiteracy of pro se  
22 prisoner is insufficient to meet standard of an objective, external factor amounting to  
23 “cause” for purposes of avoiding procedural bar on habeas claims).

24       Accordingly, in light of the foregoing, Petitioner is not entitled to equitable  
25 tolling because he has failed to satisfy either of the *Pace* elements. Petitioner has not  
26 met his burden to show he was reasonably diligent in pursuing federal habeas relief  
27 throughout the time that AEDPA’s limitation period was running, nor has he shown  
28 he was prevented from filing a timely petition because of extraordinary circumstances.

**ORDER**

Based upon the foregoing, the Court finds the Petition, attached exhibits, and relevant state court records indicate it is untimely. Accordingly, Petitioner shall have until **September 5, 2008**, to file a written response and show cause why his Petition should not be dismissed with prejudice because it is time-barred. In responding to this Order, Petitioner must show by declaration and any exhibits what, if any, factual or legal basis he has for claiming that the Court's foregoing analysis is factually or legally incorrect, or that AEDPA's one-year statute of limitations should be tolled, or the start date extended. If Petitioner contends he is entitled to tolling because of a lack of access to the prison law library due to a purported lockdown or some other state-created impediment, his written response must be supported by a declaration from the warden or prison librarian verifying that the law library and library materials were unavailable throughout the relevant time period because of the lockdown or other stated reason. Further, Petitioner must demonstrate that, during the time that access to the prison law library was allegedly unavailable, he made requests for legal materials to be brought to his cell and those requests were denied.

**Petitioner is warned that if a timely response to this Order is not made, Petitioner will waive his right to do so and the Court will, without further notice, issue an order dismissing the Petition, with prejudice, as time-barred. Further, if Petitioner determines the Court's above analysis is correct and the Petition is clearly time-barred, he should file a Request For Voluntary Dismissal of this action pursuant to Fed. R. Civ. P. 41(a)(1) in lieu of a response to this Order.**

IT IS SO ORDERED.

DATED: August 15, 2008

  
 ARTHUR NAKAZATO  
 UNITED STATES MAGISTRATE JUDGE